Supreme Court, U.S.
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No. 99-1434

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

THE MEAD CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENT

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STATEMENT PURSUANT TO RULE 29.6

Respondent The Mead Corporation has no parent company, and there is no publicly held company which owns 10% or more of The Mead Corporation's stock.

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CITATIONS OF OPINIONS BELOW

Petitioner (the "Government") cites Customs Service ("Customs") Headquarters Ruling Letter No. ("HQ") 955937 (Oct. 21, 1994), reported unofficially at 1994 WL 712863 (Appendix to Petition ("Pet. App.") 28a-47a), as "[t]he Customs Service ruling that applies to this case." However, the classification rejected by the United States Court of Appeals for the Federal Circuit ("Federal Circuit") was first made in Customs HQ 953126 (Jan. 11, 1993), reported unofficially at 1993 WL 68471 (Appendix to Respondent's Brief in Opposition ("Opp. App.") 4a-6a) which revoked and modified New York Customs Ruling Letter No. ("NY") 864206 (June 19, 1991), reported unofficially at 1991 U.S. Custom NY LEXIS 344 (Opp. App. 1a-3a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the provisions set out by the Government, the following statutory and regulatory provisions are pertinent to the Court's consideration:

1. General Rule of Interpretation ("GRI") 1 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202:

   Classification of goods in the tariff schedule shall be governed by the following principles:

   1. The table of contents, alphabetical index, and titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions . . . .

2. The tariff provisions under which the imported loose-leaf day planners were classified by Customs and claimed

classifiable by Mead, heading 4820 and subheadings 4820.10, 4820.10.20 and 4820.10.40 of the Harmonized Tariff Schedule of the United States ("HTSUS"), are set forth in their entirety:

4820 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles, exercise books, blotting pads, binders (loose-leaf or other), folders, file covers, manifold business forms, interleaved carbon sets and other articles of stationery, of paper or paperboard; albums for samples or for collections and book covers (including cover boards and book jackets) of paper or paperboard:

4820.10 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles:

4820.10.20 Diaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles 3.6%

4820.10.40 Other 0%

3. 19 C.F.R. § 177.1 General ruling practice and definitions:

(d) *Definitions.* (1) A "ruling" is a written statement issued by the Headquarters Office or the appropriate office of Customs as provided in this part that interprets and applies the provisions of the Customs and related laws to a specific set of facts. A "ruling letter" is a ruling issued in response to a written request therefor and set forth in a letter addressed to the person making the request or his designee. A "published ruling" is a ruling which has been published in the Customs Bulletin.

4. 19 C.F.R. § 177.9 Effect of ruling letters; modification or revocation:

(c) *Reliance on ruling letters by others.* A ruling letter is subject to modification or revocation without notice to any person, except the person to whom the letter was addressed. Accordingly, no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter.

STATEMENT OF THE CASE

Petitioner asserts that Customs' day-to-day classification rulings are entitled to judicial deference, but it does not specify whether the deference sought is controlling-weight deference or merely respectful consideration. The Government's lack of specificity is telling, as this Court's jurisprudence leads to the conclusion that classification rulings in general are entitled to little, if any, respect. Nevertheless, the level of deference sought is ultimately immaterial, as Customs' tariff classification at issue arises out of a statutory construction which contravenes the express language of the tariff schedules and, thus, is entitled to no deference.

This case concerns the proper tariff classification of five models of loose-leaf day planners imported into the United States in 1995 from China by Respondent, The Mead Corporation ("Mead").[1] The five day planners were classified by Customs as "bound diaries" under HTSUS subheading 4820.10.20, and were assessed with a 3.6% rate of duty.[2] It is

1. Mead, an Ohio corporation, is one of the world's largest manufacturers of paper, the largest United States manufacturer and distributor of school supplies and a leading provider of stationery products in the United States.

2. For the years 1993 and 1994, subheading 4820.10.20 carried a 4.0% rate of duty. Beginning January 1, 1995, the duty rate for goods classifiable thereunder has been annually reduced by .4%. The reductions will continue until the duty reaches 0% on January 1, 2004. The Government erroneously states that the HTSUS subheading

(Cont'd)

Mead's position that the proper statutory construct of heading 4820 and subheadings 4820.10 and 4820.10.20 requires no agency interpretation and establishes that loose-leaf day planners are neither "diaries" nor "bound," and are, therefore, correctly classifiable under the basket "other" provision, subheading 4820.10.40, which was and remains a duty-free tariff provision.

Mead imported five styles of day planners. (Actual specimens of the five day planners may be found in the record below at Plaintiff's Exhibits 1-5 in the summary judgment proceedings before the United States Court of International Trade ("CIT").) Similar office supply products are sold by competitors as "organizers" or "agendas," but whether characterized as day planners, agendas or organizers, the articles are designed to assist individuals in organizing their activities and schedules in a convenient, multi-functional product.[3]

Included in all of the Mead day planners are a calendar, "daily planner" pages, telephone/address sheets, a notepad and information sheets. Some models also contain additional features, such as a plastic ruler, plastic pouch, credit card holder and computer diskette holder. All of the contents of the day planner (except for the notepad, which is inserted into a rear flap of the day planner's outer cover) are held in place in a loose-leaf ring binder.[4] The loose-leaf structure permits the contents of the day planners to be easily repositioned, removed

(Cont'd)
4820.10.20 duty rate in 1993 and 1995 was 3.2%. Brief for the United States ("Pet. Br.") at 7. The duty rate for these years was actually 4.0% and 3.6%, respectively.

3. For convenience, such articles are referred to as "day planners" in this brief.

4. Although the second Question Presented by the Government asserts that the day planners imported by Mead include "spiral-bound" day planners, Pet. Br. at (I), the day planners at issue are all "loose-leaf" items arranged in ring binders. *See* Plaintiff's Exhibits 1-5. None are spiral-bound.

or replaced. An "Accessories & Refills" sheet, provided with the day planners, enables the consumer to order replacements and refills for the different sections.

Customs' Role in Tariff Classifications

The Harmonized Tariff Schedule of the United States became effective on January 1, 1989. *See* Omnibus Trade and Competitiveness Act of 1989, § 1217, Pub. L. No. 100-418, 102 Stat. 1107, 1163. The HTSUS replaced the Tariff Schedule of the United States ("TSUS") which had regulated the importation of goods since 1963. All goods must be assigned an HTSUS classification and corresponding duty rate when imported into the United States. Although it is not mandatory, prudent importers generally seek a binding classification ruling from Customs when importing a new product. To obtain a classification ruling on a specific article, an importer must submit a written request to Customs prior to importation. 19 C.F.R. §§ 177.1, 177.2.

A Customs ruling involves mixed questions of fact and law for it "is a written statement issued by the Headquarters Office or the appropriate office of Customs . . . that interprets and applies the provision of the Customs and related laws to a specific set of facts." 19 C.F.R. § 177.1(d)(1). Regulations provide that ruling letters can be sought from any of Customs' 45 service ports of entry.[5] 19 C.F.R. § 177.2(a). Currently, 10,000 to 15,000 rulings a year are issued from the various ports[6] and Headquarters.[7]

5. Customs service ports of entry are enumerated in 19 C.F.R. § 101.3(b)(2).

6. *See* Treasury Advisory Committee on the Commercial Operations of the United States Customs Service, Report of the COAC Subcommittee on OR&R, Exhibit 1 (January 26, 2000).

7. The term "Headquarters" or "Headquarters Office" or "Customs Headquarters" means the Office of Regulations and Rulings at Headquarters, United States Customs Service, Washington, D.C. 19 C.F.R. § 177.1(d)(6).

The rulings before the Court were issued without notice-and-comment; they were not published in the Customs Bulletin or the Federal Register.[8] Once issued, a ruling letter is binding only upon other transactions involving the same item and same importer: "[N]o other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter." 19 C.F.R. § 177.9(c).

The huge number of rulings issued each year (10,000 to 15,000) and the great number of ports authorized to issue ruling letters (45) create a serious likelihood of inconsistencies in the classification rulings issued. In recognition of this circumstance, Congress directed, in Section 7361(c) of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4474-75, that Customs promulgate regulations specifically addressing problems created by inconsistent rulings. *See* 19 C.F.R. § 177.12 ("Inconsistent customs decisions").

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8. The Government's inclusion, in the "Statutory and Regulatory Provisions Involved," of 19 C.F.R. § 177.10(c), which requires notice-and comment publication in the Federal Register for rulings that have "the effect of changing a practice," is misleading. Pet. Br. at 5. This regulation has no bearing on this appeal, as its application is limited to rulings that have established a "uniform practice." *See Old Republic Ins. Co. v. United States*, 645 F. Supp. 943, 947-48 (Ct. Int'l Trade 1986) (19 C.F.R. § 177.10(c) notice requirements not applicable to rulings that do not establish a "uniform practice"). A "uniform practice" may only be established by (i) a formal "finding" by the Secretary of Treasury, (ii) a ruling published in the Customs Bulletin pursuant to 19 C.F.R. § 177.10(b) or (iii) "evidence of uniform classification and liquidation of merchandise at various ports over an extended period of time." *Heraeus-Amersil, Inc. v. United States*, 795 F.2d 1575, 1580-81 (Fed. Cir. 1986). Neither party has claimed that any classification of Mead's day planners is a "uniform practice." Further, the Federal Circuit specifically excluded from its holding below rulings proposing changes in uniform practice that are published in the Federal Register pursuant to 19 C.F.R. § 177.10(c). Pet. App. 6a n.1.

The classification and duty rate for the goods imported become final unless the importer, pursuant to 19 C.F.R. § 174.12, files an administrative protest contesting the liquidation[9] of the entry. 19 U.S.C. § 1514. Customs provides a one-page form for filing protests, with spaces for the importer to identify the port of entry and describe the imported item. 19 C.F.R. § 174.13; Customs Form 19. The form also has a space (one inch high, extending the full width of the page) for the importer to list "Detailed Reasons for Protest," with an opportunity for the importer to attach additional pages if desired. *Id.* The protest is usually decided at the local port of entry, without further submissions, unless the importer seeks "further review" of the classification at Customs Headquarters. 19 C.F.R. §§ 174.23, 174.29. If the importer's request for "further review" is granted, Headquarters issues a final decision addressing the reasons provided on the form; if the importer's request is rejected, the local port will make the final determination on the protest. *See* 19 C.F.R. § 174.26.

The CIT has exclusive jurisdiction to hear actions contesting the denial of importers' classification protests. 28 U.S.C. § 1581(a). Before appealing to the CIT, the importer must exhaust its administrative remedies, including filing an administrative protest.[10] 19 U.S.C. § 1514; 28 U.S.C. § 2637. The CIT is statutorily required to review protested customs classification cases *de novo*. 28 U.S.C. § 2640(a). Once the classification dispute is before the CIT, the presumption of correctness places the burden of proof on the importer to establish, by a preponderance of the evidence, that Customs' classification was incorrect. 28 U.S.C. § 2639(a)(1).

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9. "Liquidation" is a term of art referring to the final accounting between Customs and the importer for the duties owed on an entry. *See* 19 C.F.R. § 159.1.

10. An importer is not required to request "further review" of a protest before seeking judicial review in the CIT. *See* 19 C.F.R. § 174.23.

Classification Rulings of Day Planners, Including Mead's

Classification determinations involving diaries were originally made pursuant to paragraph 1410 of the Tariff Act of 1930, as modified by several treasury decisions. The Tariff Act contained a provision for "blank books, slate books, drawings, engravings, photographs, etchings, maps, and charts." Tariff Act of 1930, ch. 497, § 1410, 71st Cong., Sess. II. In 1956, a separate duty rate provision was created for "[a]ddress books, diaries, and notebooks" as a subdivision of "blank books and slate books." T.D. 53865, 90 Treas. Dec. 234 (1955). Blank books and slate books that were not "diaries, notebooks, and address books" were separately classified, T.D. 53877, 90 Treas. Dec. 280 (1956), but no distinction was made *within* the classification of diaries.

On August 31, 1963, the TSUS became the official schedule for classification of imported articles. Proclamation No. 3598, *as authorized by* Tariff Classification Act of 1962, Pub. L. No. 87-456, 76 Stat. 72. The relevant classification provision, listed under the section titled "Paper, Paperboard, and Products Thereof," appeared in the TSUS as follows:

> Blank books, bound:
> 256.56 Diaries, notebooks, and address books
> 256.58 Other

TSUS, 19 U.S.C. § 1202. The classification for "diaries" under the TSUS, like its predecessor tariff provisions, distinguished only between "diaries," "notebooks," "address books" and "other" blank books.

Effective January 1, 1989, the HTSUS replaced the TSUS as the tariff schedules under which imported articles were to be classified by Customs. The provisions applicable to diaries changed substantially, providing narrower categories for their classification: Subheading 4820.10 included the broad category of "diaries and similar articles," which was divided into

subheading 4820.10.20 ("Diaries, notebooks and address books, bound . . .") and subheading 4820.10.40 ("Other"). Unlike its predecessor tariff schedules, the HTSUS drew an express distinction between "bound diaries" and "diaries and similar articles."

In the earliest years following the adoption of the HTSUS, day planners were viewed by Customs not as "diaries" under subheading 4820.10, but as articles similar to diaries, resulting in a duty-free classification as "other," under subheading 4820.10.40. *See, e.g.*, HQ 085086 (Sept. 13, 1989), 1989 WL 381276 (internal agency letter classifying "Select School Agenda and Planning Guide") (Joint Appendix to Federal Circuit ("Fed. Cir. JA") 30-31); HQ 085515 (Dec. 14, 1989), 1989 WL 381472 (issued to Premier Printing Ltd., classifying student agendas and teacher multi-purpose blank books) (Fed. Cir. JA 32-34); HQ 950984 (Jan. 27, 1992), 1992 WL 313509 (issued to Advance Shipping Co., Inc., classifying agenda book) (Fed. Cir. JA 35-36). Because Customs regulations precluded Mead from relying on classification rulings provided to other importers on non-identical articles, *see* 19 C.F.R. § 177.9(c), Mead sought a classification ruling for its own day planners. In NY 864206 (June 19, 1991) (Opp. App. 1a-3a), consistent with its earlier issued day planner rulings, Customs expressly ruled that Mead's day planner model 47104 was not a "bound diary" but was properly classifiable as an article similar to a diary under the basket "other" provision.

In 1993, however, Customs issued, *sua sponte*, HQ 953126 (Jan. 11, 1993),[11] in which it revoked the prior classification of

11. While HQ 953126 is indisputably the Customs classification ruling that first classified Mead's day planners as "bound diaries" under subheading 4820.10.20, it is not the ruling to which Customs has sought deference. Indeed, HQ 953126 is not even referenced in the Government's brief. Instead the Government has focused the Court's attention on HQ 955937 (Oct. 21, 1994), the protest decision issued by Headquarters in response to Mead's request for further review of the classification set forth in HQ 953126.

Mead's day planners.[12] (Opp. App. 4a-6a). This ruling reclassified Mead's loose-leaf day planners as "bound diaries" under HTSUS subheading 4820.10.20, and imposed a duty of 4.0%.[13] *Id.* In response to this adverse and unexpected ruling, Mead filed administrative protest number 4501-93-100016, contesting the modified classification and resulting increase in duty rate. The protest should have been mooted by Customs' August 18, 1993 approval of Mead's independent request that the entries entered within 90 days of the issuance of HQ 953126 be reliquidated duty-free, because of Mead's detrimental reliance on the earlier 1991 ruling. *See* HQ 953690 (Aug. 18, 1993)[14] (Opp. App. 7a-10a). Despite the grant of detrimental reliance, Customs superfluously denied Mead's protest in HQ 955937 (Oct. 21, 1994) (Pet. App. 28a-47a).[15]

12. In the Customs Modernization Act of 1993, Congress amended 19 U.S.C. § 1625 to require that Customs implement notice-and-comment procedures with respect to any "interpretive ruling" that would "modify . . . or revoke a prior interpretive ruling or decision." 19 U.S.C. § 1625(c). That notice-and-comment procedure does not require publication in the Federal Register. *Id.* Notice-and-comment procedures are not, however, required for new classification decisions. The amendment went into effect on December 8, 1993, nearly one year after the issuance of Customs' modification of the classification of Mead's imported day planners. *See* Customs Modernization Act of 1993, Pub. L. No. 103-182, 107 Stat. 2057, 2099; HQ 953126 (Jan. 11, 1993) (Opp. App. 4a-6a). Customs was thus not required to — and, in fact, did not — go through notice-and-comment procedures before changing the classification of Mead's day planners.

13. To challenge Customs' classification and duty rate assessment on its imported day planner entries, Mead has been required to file (and continues to file for its current imports), administrative protests against the liquidation of its entries. 19 U.S.C. § 1514(a)(2).

14. No Westlaw or Lexis reference is provided for rulings that are not currently available through those public databases.

15. Mead's decision not to seek review of the denial of this particular protest was not an acceptance of the classification. *Cf.* Pet. Br. at 10. Rather, judicial review of that denial was not possible,

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Procedural History

Following denial of protest number 4501-95-100100, Mead commenced an action in the CIT to contest Customs' classification of its day planners. Mead and Customs both sought *de novo* review of the appropriate classification for the Mead day planners (*see* 28 U.S.C. § 2640(a)(1)), and both parties immediately made cross-motions for summary judgment. Mead sought a judgment that the day planners should be properly classified, as they originally had been, under the duty-free "other" provision, subheading 4820.10.40. In support of its motion, Mead submitted affidavits of nine experts in the stationery and bookbinding industry, establishing that Customs' definitions of "diaries" and "bound" conflicted with common commercial usage of the words, Fed. Cir. JA 98-103, 107-127, and the Government submitted two affidavits of purported experts in the binding and leather goods industries in support of Customs' definitions, *id.* at 134-135, 183-184. Customs contended that its classification was correct, and included an argument that deference pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), should be accorded to its classification ruling. However, Customs expressly withdrew its deference argument, by letter to the court, before the CIT considered the issue.[16] Opp. App. 11a-12a.

On July 14, 1998, the CIT entered judgment in favor of Customs, affirming Customs' classification of the Mead day planners under subheading 4820.10.20. Pet. App. 19a-27a. The

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as Mead had already obtained complete relief from any obligation to pay a duty on the affected entries as a result of the August 1993 grant of detrimental reliance relief. Opp. App. 7a-10a. Any judicial review of the classification of Mead's loose-leaf day planners would therefore have to be sought based on denial of a subsequent protest. *See* n.13, *supra*.

16. *See* Respondent's Brief in Opposition ("Opp. Br.") at 13-15.

CIT reviewed the classification *de novo* and reached the same conclusion that Customs had reached, applying the same flawed reasoning set forth in HQ 955937 (Oct. 21, 1994).

Mead appealed the CIT decision to the Federal Circuit.[17] Customs, consistent with the position it took in the lower court, limited the scope of its arguments to the meaning of the tariff terms "diaries" and "bound," and did not request deference to any underlying Customs classification rulings. However, after the appeal had been fully briefed, this Court issued its decision in *United States v. Haggar Apparel Co.*, holding that Customs notice-and-comment regulations are entitled to controlling weight under *Chevron*. 526 U.S. 380 (1999). Reacting to that decision, the Federal Circuit requested supplemental briefs on the question, "How, if at all, does the Supreme Court's decision in *United States v. Haggar Apparel Co.*, 119 S. Ct. 1392 (1999), affect this court's standard of review of classification rulings issued by the United States Customs Service?". Opp. App. 13a-14a.

After receiving the requested supplemental briefs, the Federal Circuit issued its decision on the proper tariff classification of Mead's loose-leaf day planners. Pet. App. 1a-18a. The Federal Circuit reversed the CIT on two independent bases,[18] concluding that (i) the Mead loose-leaf day planners were not "diaries" under subheading 4820.10.20, and (ii) the Mead loose-leaf day planners were not "bound" under subheading 4820.10.20, and ruled that the day planners "are properly classified under the 'other' subheading of 4820.10.40." *Id.* at 8a-16a.

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17. The Federal Circuit has exclusive jurisdiction over appeals from the CIT. 28 U.S.C. § 1295(a)(5).

18. Because subheading 4820.10.20 requires that articles within its scope be both "diaries" and "bound," a finding that the day planners were *either* not diaries *or* not bound would have sufficed to overturn Customs' classification.

To reach its decision, the Federal Circuit examined subheading 4820.10.20 and found that the proper statutory construction of "diaries and similar articles" required a distinction between diaries and articles similar to diaries, whereas Customs' interpretive ruling and the CIT's broad definition of "diaries" had ignored that distinction and rendered the phrase "similar articles" meaningless. The Federal Circuit correctly recognized that the CIT (and Customs) had mistakenly relied on *Baumgarten v. United States*, 49 Cust. Ct. 275 (1962), *Brooks Bros. v. United States*, 68 Cust. Ct. 91 (1972) and *Charles Scribner's Sons v. United States*, 6 Ct. Int'l Trade 168 (1983). Pet. App. 8a-11a. These cases — all decided before 1989 (and therefore pre-HTSUS) and all involving permanently bound books — considered the term "diaries" as it was used under the TSUS and predecessor tariff schedules, none of which contained the specificity found in the applicable HTSUS provisions. These prior versions of the tariff schedules failed to distinguish diaries from articles similar to diaries; thus, the CIT had relied upon decisions that never reached the issue presented in this case. "The more precise HTSUS classification scheme, which distinguishes diaries from articles similar to diaries, necessitates a more precise definition of the terms at issue." Pet. App. 11a.

In addition, the Federal Circuit concluded that the diaries were not "bound." Noting that both parties had agreed that the articles listed in subheading 4820.10.20 are books, the court applied the common meaning of the term "bound" in the context of books, *i.e.*, "means permanently secured or fastened." Pet. App. 15a. The Federal Circuit held that the CIT (and Customs) had erred in construing "bound" in a broader sense, which disregarded the word's meaning in the context of books. *Id.* Because the design and purpose of a loose-leaf binder is for its contents to be moveable and replaceable, the Federal Circuit concluded that the contents of the day planners are not permanently secured or fastened, and as a result the articles are not "bound." *Id.*

In reaching its decision, the Federal Circuit determined "that *Haggar*, and thus *Chevron* deference, does not extend to ordinary classification rulings." Pet. App. 5a. The Federal Circuit contrasted the "procedural safeguards" provided in notice-and-comment regulations with the Customs classification ruling process, which "does not involve public debate or discussion, but is confined to the specific facts of and parties to the particular transaction at issue." *Id.* at 5a-6a. In addition, informed by this Court's analogy between customs and tax matters, *see Haggar*, 526 U.S. at 394, the Court of Appeals observed that this Court has accorded deference to IRS regulations, *see Atlantic Mut. Ins. Co. v. Commissioner*, 523 U.S. 382, 389 (1998), but has not extended deference to IRS interpretive rulings. *See Commissioner v. Schleier*, 515 U.S. 323, 336 n.8 (1995) (noting that IRS interpretive rulings "do not have the force and effect of regulations" (quoting *Davis v. United States*, 495 U.S. 472, 484 (1990))). The Federal Circuit concluded that Customs classification rulings are "an even less formalized body of interpretation than IRS revenue rulings," Pet. App. 7a, and, therefore, even less worthy of *Chevron* deference.

The Government thereafter petitioned the Federal Circuit for a rehearing en banc, which petition was denied. Customs then filed its petition for a writ of certiorari to this Court, which was granted on May 30, 2000.

SUMMARY OF ARGUMENT

I. The particular Customs classification ruling at issue here received the deference that it deserved under *Chevron* and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) — none. The Federal Circuit's decision to afford "no [*Chevron*] deference" to this Customs classification ruling is not, as the Government would suggest, an affront to this Court's jurisprudence, but instead demonstrates the Federal Circuit's complete appreciation of the underpinnings of the *Chevron* doctrine. As for *Skidmore* deference, it was not sought by the Government below, but once the Federal Circuit's analysis

demonstrated that the tariff provisions — HTSUS heading 4820 and applicable subheadings — were not ambiguous, then *Skidmore* deference, like *Chevron* deference, was unavailable and inapposite.

Mead's daily planners are not bound diaries under HTSUS subheading 4820.10.20; rather, they are articles similar to diaries under superior subheading 4820.10, properly classifiable under the basket "other" provision, subheading 4820.10.40. Customs' interpretation misconstrues two of the statutory terms, and either one of these errors is independently fatal to Customs' classification. First, it ignores the basic express statutory demarcation between "diaries" and "similar articles," and construes "diaries" alone broadly enough to encompass "similar articles." Second, Customs' construction renders superfluous the qualifier "bound" in subheading 4820.10.20 by failing to distinguish it from the superior heading, which does not include the "bound" qualifier. Customs' statutory construction is therefore unreasonable and not entitled to deference. As this Court has repeatedly held, an administrative interpretation that is contrary to clear Congressional intent is entitled to no deference under *Chevron* or *Skidmore*. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2146 (1999); *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 479 n.14 (1997); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 109 (1993).

II. Customs' specific classification ruling here, even if it did not contravene Congressional intent, would still not warrant, as one of 10,000 to 15,000 ordinary classification rulings issued annually, controlling-weight deference pursuant to *Chevron*. As explained in *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), only Customs' administrative interpretations that bear the earmarks of law are entitled to *Chevron* deference. Customs classification rulings, however, are not subject to procedural safeguards and do not create legal norms; under *Haggar*, they are not within the scope of the *Chevron* deferential

framework. Even if one were to shoehorn this ruling into the *Chevron* two-step analysis, the ruling at issue would not merit controlling weight. It would fail the first *Chevron* step, because no regulatory interpretation is called for — or authorized — by the statute, and it would fail the second step because it is unreasonable and counter to clear Congressional intent.

III. Customs classification rulings should be accorded "respect" only to the extent that they have the "power to persuade." *See Skidmore*, 323 U.S. at 140. Here, the Customs classification ruling was based upon flawed reasoning and was inconsistent with prior, contemporaneous construction of the applicable tariff provisions. The ruling therefore lacked the "power to persuade," and the Federal Circuit properly rejected it in reaching the correct classification. *See, e.g., EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (*overruled on other grounds by statute, see Stender v. Lucky Stores, Inc.*, No. C-88-1467, 1991 WL 354882, at *2 (N.D. Cal. Dec. 19, 1991)).

ARGUMENT

I. CUSTOMS' CLASSIFICATION RULING CONTRAVENED THE PLAIN LANGUAGE OF THE TARIFF SCHEDULES AND WAS THEREFORE ENTITLED TO NO DEFERENCE.

The Government's arguments assiduously avoid the real question before the Federal Circuit and before this Court — statutory interpretation. The Federal Circuit's decision can — and should – be affirmed without reaching the issue of deference to be accorded to classification rulings, because Customs' statutory construction of the tariff schedules violated the plain, unambiguous language of the statute. *See Sutton v. United Air Lines, Inc.*, 119 S. Ct. 2139, 2146 (1999) (no need to decide deference due to guidelines issued by EEOC and Department of Justice, because agencies' guidelines adopted "an impermissible interpretation of the ADA"); *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 479 n.14 (1997)

(declining to decide whether *Chevron* principles were applicable to CFTC's interpretation because administrative deference was improper in face of clearly expressed Congressional intent); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 109 (1993) (no need to decide whether *Chevron* or *Skidmore* deference was due to Department of Labor interpretation that "exceeded the scope of available ambiguity" in ERISA statute).

The tariff classification for Mead's imported day planners was governed by HTSUS heading 4820 and its relevant subheadings. 19 U.S.C. § 1202. Consideration of the Government's appeal must begin (and, Mead submits, end) with a simple reading of the clear, express language of that provision:

> 4820 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, ***diaries and similar articles***, exercise books, blotting pads, binders (loose-leaf or other), folders, file covers, manifold business forms, interleaved carbon sets and other articles of stationery, of paper or paperboard; albums for samples or for collections and book covers (including cover boards and book jackets) of paper or paperboard:
>
> 4820.10 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, ***diaries and similar articles***:
>
> 4820.10.20 ***Diaries, notebooks and address books, bound;*** memorandum pads, letter pads and similar articles ..... 3.6%[19]
>
> 4820.10.40 Other 0%

19 U.S.C. § 1202 (emphasis added).

19. *See* n.2, *supra.*

General Rule of Interpretation 1 of the HTSUS provides that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1, 19 U.S.C. § 1202. To interpret the provision under which Mead's day planners should be classified, it is therefore necessary to begin by examining the language of heading 4820. *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998) (CIT erred in construing HTSUS subheadings without first addressing headings).

Heading 4820 establishes the broad category "diaries and similar articles," which is then carried into subheading 4820.10. Thereafter, "diaries and similar articles" is broken down into two separate inferior subheadings: the narrow category of "diaries, . . . bound" in subheading 4820.10.20, and the basket "other" subheading, 4820.10.40. "Bound diaries" is more narrowly drawn than "diaries and similar articles."[20] The basket "other" provision therefore necessarily captures, *inter alia*, all goods embraced by "diaries and similar articles" that are not encompassed by "bound diaries."[21]

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20. In the HTSUS, "headings are designed at the broadest coverage levels with 4-digit numerical codes (or headings) and . . . are further subdivided into narrower categories assigned two additional digits (which comprise 6-digit numerical codes or subheadings)." *What Every Member of the Trade Community Should Know About: Tariff Classification Under the Harmonized Tariff Schedule, A Basic Level Informed Compliance Publication of the U.S. Customs Service*, p.3 (Nov. 1997) (PDF version) <http://www.customs.ustreas.gov/imp-exp1/comply/htspub2.htm> (hereinafter "*Tariff Classification Under the HTSUS*"); *cf. Marcel Watch Co. v. United States*, 11 F.3d 1054, 1058 (Fed. Cir. 1993) (under predecessor schedule TSUS, "a superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby" (quoting TSUS Rule 10(c)(i))).

21. The semi-colon in subheading 4820.10.20 separating "diaries, notebooks and address books, bound" from "memorandum pads, letter pads and similar articles" indicates that, in that provision, "and similar

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Customs originally classified Mead's loose-leaf day planners as articles similar to diaries, under the basket "other" provision, 4820.10.40. Opp. App. 2a. Customs' 1993 modification changed the classification from articles similar to diaries (4820.10.40) to bound diaries (4820.10.20) with the perfunctory explanation that "daily planners are generally used for daily recordkeeping and are classifiable as diaries." *Id.* at 5a. In response to Mead's protest and request for further review, Customs attempted to justify its new classification by means of two statutory constructs: (1) that the term "diaries," as used in the statute, is broad enough to encompass day planners, and (2) that the term "bound," as used in the statute, is broad enough to include a loose-leaf arrangement of pages. *Id.* Neither interpretation is permissible in view of the plain language of the statute.

Customs interpreted the word "diaries" to signify "a broader concept of diary," Pet. App. 34a, despite the clear statutory distinction drawn by the use of the phrase "diaries and similar articles." Customs looked to the Compact Edition of the Oxford English Dictionary ("OED") to justify its classification ruling that "diaries" was broad enough to encompass Mead's day planners. Definition 1, which was adopted by the Federal Circuit, Pet. App. 12a, is the narrower definition: "A daily record of events or transactions, a journal; specifically, a daily record of matters affecting the writer personally, or which come under his personal observation." Fed. Cir. JA 65. Definition 2, which Customs selected, is significantly broader: "A book prepared for keeping a daily record, or having spaces with printed dates for daily memoranda and jottings; also, applied to calendars containing daily memoranda on matters of importance to people generally, or to members of a particular profession, occupation, or pursuit." *Id.* The selected definition is too broad for the

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articles" refers only to the portion after the semi-colon. *Cf.* Pet. App. 31a (recognizing that 4820.10.20 does not cover articles similar to diaries).

statutory context of "diaries and similar articles."[22] If "diaries" includes everything covered by OED definition 2, then what is meant by "diaries *and similar articles*"? Customs' "broader concept" of "diaries" robs the phrase "and similar articles" in heading 4820 and subheading 4820.10 of any meaning. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987) (refusing to accord *Chevron* deference to agency interpretation that went against statutory language in ascribing identical meaning to two different statutory phrases).

With respect to "bound," Customs interpreted the term to describe any means "which binds pages together in a fixed order."[23] Pet. App. 46a. The additional specification "bound" in

22. This second OED definition includes "calendars." Calendars, however, are the subject of a completely different tariff classification under the HTSUS. *See* HTSUS heading 4910.00, 19 U.S.C. § 1202. The inclusion of "calendars" in the selected definition highlights the overbreadth of Customs' chosen interpretation.

23. The cornerstone of the Government's definition of "bound" is an inapposite quotation, taken out of context, from the Explanatory Notes to the Harmonized Commodity Description and Coding System ("Explanatory Notes"), which constitute an extrinsic commentary on the Harmonized Tariff System ("HS"). Congress, the Courts and Customs itself all agree that the Explanatory Notes are not binding authority. *See* H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582; *Marubeni America Corp. v. United States*, 35 F.3d 530, 535 n.3 (Fed. Cir. 1994); T.D. 89-80, 54 Fed. Reg. 35127, 35128 (1989). The HS is the international tariff classification system upon which the HTSUS is based. *See Tariff Classification Under the HTSUS* at 2, 21. The HS includes detail only to the six-digit level — i.e., subheading 4820.10 ("diaries and similar articles"); the eight-digit level present in the HTSUS — *i.e.*, subheading 4820.10.20 ("bound diaries") — was independently drafted and added by Congress and was not part of the HS. Customs itself tells the public that the Explanatory Notes, which apply only to the HS, "are intended to be applicable at the 4-digit (heading) numerical code level, and sometimes at the 6-digit (subheading) numerical code level." *Tariff Classification Under the HTSUS* at 16. Contrary to the Government's (Cont'd)

subheading 4820.10.20 demonstrates that the more general "diaries and similar articles" in 4820.10 includes items that are not "bound," but Note 9 of HTSUS Chapter 48 specifically provides that "[h]eading 4820 does not cover loose sheets." It follows, therefore, that the pages of all articles included within the phrase "diaries and similar articles" of subheading 4820.10, must be held together in some way. The loose-leaf arrangement of Mead's day planners holds the pages in place, but not permanently. To find that such an arrangement is encompassed within the specification "bound" begs the question, what arrangement of pages (other than the loose sheets expressly excluded from the subheading) is *not* "bound"? Customs' definition renders the "bound" qualifier superfluous, and is therefore incorrect. *See Dunn*, 519 U.S. at 472 ("legislative enactments should not be construed to render their provisions mere surplusage"). The statutory context shows that the term "bound" is not intended as a qualifier to distinguish "bound" items from loose sheets. Rather, although superior subheading 4820.10 includes book and non-book articles, "bound" is only found in the narrower subheading 4820.10.20, which, both parties agree, covers only books. Pet. App. 14a-15a;

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disingenuous arguments, the Explanatory Notes are not applicable, according to Customs itself, at the eight-digit level and provide no insight into the meaning Congress intended to give to the word "bound," which only appears at the eight-digit level.

Reading the quoted language in its proper context reinforces the inapplicability of the selected portion of the Explanatory Notes. The quotation appears in an explanation of the types of articles covered by heading 4820, all of which are made of paper or paperboard. By specifying that "goods of this heading may be bound with materials other than paper . . . and have reinforcements or fittings of metal, plastics, etc.," the Harmonized System drafters were merely stating that some articles incorporating materials other than paper may fit within the heading. The Government's reliance on the Explanatory Notes as a definition of the statutory qualifier "bound" is wholly misguided and inappropriate.

see also Brief for Appellee at 12, *The Mead Corp. v. United States*, 185 F.3d 1304 (Fed. Cir. 1999) (No. 98-1569). "Bound" must therefore be construed in the context of books, as the Federal Circuit properly did, defining the term as "permanently secured or fastened." *Id.* Customs' definition is outside of this statutory context and is erroneous. *See Davis v. Michigan Dep't of Treas.*, 489 U.S. 803, 809 (1989) ("words of a statute must be read in their context").

Customs' contorted construction was incorrect and unnecessary; Customs should not have gone beyond the language of the statute to determine the classification of the loose-leaf day planners at issue. *See Marcel Watch*, 11 F.3d at 1058 ("Resort to extrinsic aids in interpreting the provisions at issue is unnecessary where, as here, the statutory language clearly and unambiguously manifests congressional intent."). "Diaries" is plainly intended to signify a narrow definition of the term, which excludes day planners, while "diaries and similar articles" signifies a "broader concept of diary," which can include Mead's day planners. The specification "bound" is plainly not intended to encompass *all* arrangements by which pages are held together, and is certainly not intended to encompass such temporary means as loose-leaf ring binders. Customs ignored the plain language of the statute, and its ruling is entitled to no deference. *See, e.g., Public Employees Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989).

II. CUSTOMS CLASSIFICATION RULINGS ARE NOT ENTITLED TO *CHEVRON* CONTROLLING-WEIGHT DEFERENCE.

Having deliberately ignored in its brief the express statutory language at issue, the Government further obscures its position by amorphously framing the issue as whether "judicial deference" is due to Customs classification rulings. Pet. Br. at (I). The Government's vague articulation obviously fails to address the varied gradations and analyses of judicial deference that this Court has established for different types of

administrative interpretations. This Court's jurisprudence may be divided into two co-existing, distinct analyses pursuant to which judges are to consider the deference, if any, merited by administrative actions: (1) *Skidmore*, under which certain types of administrative interpretations lack controlling authority, but may have the "power to persuade"; and (2) *Chevron*, under which certain types of administrative interpretations are deemed controlling authority. The vitality of both standards was confirmed this past term in *Christensen v. Harris County*, 120 S. Ct. 1655 (2000).

Once one appreciates the basic nature of Customs classification rulings, it is immediately apparent that they do not satisfy any of the prerequisites for controlling-weight deference under *Chevron*. First, Customs classification rulings lack the procedural and substantive underpinnings of lawmaking and, therefore, do not even qualify for analysis under the *Chevron* framework. *See Christensen*, 120 S. Ct. at 1662-63; *cf. Haggar*, 526 U.S. at 388-90 (applying *Chevron* analysis to Customs regulations published for notice-and-comment in Federal Register). Second, even in the context of *Chevron*'s analytic framework, the ruling before the Court fails both steps of the *Chevron* analysis, *see Chevron*, 467 U.S. at 842, and would therefore not qualify for controlling-weight deference.

A. *Chevron*'s Applicability Is Limited To Administrative Interpretations That Are Endowed With The Substantive And Procedural Underpinnings of Lawmaking.

Examining classification rulings in light of *Skidmore*, *Chevron*, *Christensen* and *Haggar* (the Court's only decision addressing deference to Customs classification interpretations) leads to the inevitable conclusion that Customs classification rulings are *never* within the scope of *Chevron* and are never entitled to controlling-weight deference, although under certain

circumstances, some classification rulings — but not the one before the Court — *may* be entitled to *Skidmore* deference.[24]

In *Skidmore*, the Court held that interpretative bulletins and informal rulings issued by the Administrator of the Wage and Hour Division lacked the procedural and substantive authority of controlling precedent, 323 U.S. at 139, and were therefore entitled not to preemptive deference, but to "respect" to the extent that they possessed the "power to persuade." *Id.* at 140. The Court enumerated certain factors to be considered in determining the weight that a court should give to such administrative interpretations: "the thoroughness evident in [the ruling's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Id.*

In 1984, the Court announced an additional approach to administrative deference in *Chevron*.[25] There, the Court addressed the deference to be accorded to regulations promulgated by the Environmental Protection Agency ("EPA") pursuant to the Administrative Procedure Act ("APA"). Substantively, the Court held that the EPA regulations were entitled not merely to the "respect" accorded under *Skidmore*, but to "controlling weight." *Chevron*, 467 U.S. at 844. Procedurally, the Court established a two-step analysis for

24. The application of *Skidmore* deference principles to classification rulings is discussed in Argument III, *infra* at 37-42.

25. Since the publication of *Chevron*, commentators have observed a state of flux in the law as to the continuing validity of *Skidmore* in the wake of *Chevron*. Some commentators, including one Justice of the Court – have posited that *Chevron* sounded the death knell for *Skidmore*. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511. As this Court's jurisprudence makes clear, however, *Skidmore* still thrives as the appropriate "deferential" analysis for administrative interpretations that are not sufficiently formal for the *Chevron* framework. *See Christensen*, 120 S. Ct. at 1663, discussed *infra* at 25-27 and n.27.

determining whether to give controlling weight to an administrative interpretation: In the first step, a court must determine whether Congress has spoken on the matter "interpreted" by the agency, *i.e.*, whether Congress has left a gap or ambiguity with the delegation for the agency to fill or resolve it. *Id.* at 843-44. Only "if the statute is silent or ambiguous with respect to the specific issue" does the court move to the second *Chevron* step of determining whether the interpretation is "a permissible construction of the statute." *Id.* at 843. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.

Skidmore and *Chevron* define the spectrum of judicial deference, if any, available to an administrative interpretation of law.[26] *Christensen*, the Court's recent decision holding that the *Chevron* framework was not applicable to a Department of Labor opinion letter, highlights the contrast between formal administrative interpretations, which are entitled to controlling weight, and informal interpretations, which are not:

> Here, . . . we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters — like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law — do not warrant *Chevron*-style deference. *See, e.g.*, *Reno v. Koray*, 515 U.S. 50, 61, 115 S. Ct. 2021, 132 L. Ed. 2d 46 (1995) (internal agency

26. Of course, if the administrative interpretation is counter to Congressional intent, *no* deference is required. *See* Argument I, *supra* at 16-22; *see also Morton v. Ruiz*, 415 U.S. 233, 237 (1974) ("In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose.").

guideline, which is not "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment," entitled only to "some deference" (internal quotation marks omitted)); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-258, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) (interpretative guidelines do not receive *Chevron* deference); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991) (interpretative rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers"). *See generally* 1 K. Davis & R. Pierce, *Administrative Law Treatise* § 3.5 (3d ed. 1994). Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944), but only to the extent that those interpretations have the "power to persuade."

Christensen, 120 S. Ct. at 1662-63.[27]

27. The Government has gone to great lengths to contort *Christensen*'s holding to distinguish Customs classification rulings from the category of administrative interpretations excluded from the scope of *Chevron*, Pet. Br. at 27-29 & nn.14-15, and has come up with the theory that the decision to apply the *Chevron* deferential framework hinges solely on whether the format of the agency interpretation was authorized by Congress. This reading ignores the broader concepts in the Court's reasoning, and requires a strained reading of the Court's citation to Davis (1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.5, at 120 (3d ed. 1994)). *Christensen* makes clear that *Chevron* applies only to those agency interpretations that most closely resemble formal lawmaking. Davis § 3.5 sets forth a comprehensive listing of the types of administrative determinations that are and are not subject to *Chevron* deference. Legislative regulations (Cont'd)

This Court's decision in *Haggar*, holding that Customs Federal Register notice-and-comment *regulations* fit into the *Chevron* analytical framework, illustrates the stark contrast between Customs' deliberative notice-and-comment regulations and the less formal, less reasoned classification rulings that it issues 10,000 to 15,000 times a year. Despite the Government's misleading suggestions to the contrary, *Haggar* is the only case decided by this Court involving deference to Customs classification interpretations,[28] and was expressly limited to

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— resembling statutes — and formal agency adjudications — resembling judicial determinations — are within the scope of *Chevron*, while interpretive rules, agency guidelines and opinion letters — none of which resemble formal lawmaking in either form or substance — are not within the scope of *Chevron*. Davis § 3.5. As Customs' own regulations make clear, Customs rulings are equivalent to opinion letters, *see* 19 C.F.R. § 177.1(d)(1), and are therefore outside the scope of *Chevron*. *See Christensen*, 120 S. Ct. at 1662-63.

28. By neglecting to provide any description of the facts of the cited cases and by taking quotations out of context, the Government misleadingly references several decisions for the erroneous proposition that there is precedent for according controlling-weight deference to Customs classification rulings. Perusal of the cases, however, demonstrates that no such precedent exists. The Government relies heavily on *Zenith Radio Corp. v. United States*, but *Zenith*, decided six years before *Chevron*, gave "considerable weight" (not controlling weight) to the Secretary of Treasury's "longstanding and consistent administrative interpretation" of the countervailing-duty statute. 437 U.S. 443, 450 (1978). Applying the *Skidmore* factors (without expressly citing *Skidmore*), the Court found the Secretary's interpretation entitled to "peculiar weight" as a "contemporaneous construction" that had been consistently applied for nearly 80 years. *Id.* A year after the *Zenith* case was published, Congress codified the special judicial deference due to countervailing-duty determinations, *see* 19 U.S.C. § 1516a(b), and noted in the legislative history that "countervailing duty determinations, *unlike traditional value and classification decisions*, are not subject to *de novo* review." S. Rep. No. 96-249, 96th Cong., 1st Sess. 251 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381 (emphasis added). *Zenith* is inapposite in the realm of classification rulings. (Cont'd)

Customs classification regulations published for notice-and-comment in the Federal Register. 526 U.S. at 386. The focus of

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The Government's reference to *United States v. Vowell*, 9 U.S. (5 Cranch) 368, 372 (1809), is similarly misguided. Contrary to the implication of the quote, which the Government has taken out of context, there the Court reversed Customs' accrual of duties (not a classification) in a manner inconsistent with Customs' usual practice. The Court did not defer to Customs; rather, it stated that had the law been unclear, it still would have reversed Customs because of the inconsistency with its usual practice. *Id.* Rather than supporting the Government's claim to *Chevron* deference, *Vowell* supports the application of *Skidmore*'s consistency factor when deciding whether to defer to a Customs decision.

A more appropriate account of this Court's views on classification rulings is found in *United States v. Stone & Downer Co.*, 274 U.S. 225 (1927), which was not cited by the Government. There, the Court noted the extremely limited applicability of classification rulings, and held that the doctrine of *res judicata* would not be applicable to classification determinations, except with respect to identical importations. *Id.* at 235-37. This principle has been incorporated into the regulations governing Customs classification rulings. 19 C.F.R. § 177.9(c).

The Government also argues that the Federal Circuit has traditionally accorded deference to Customs' interpretive rulings and regulations, citing *Guess? Inc. v. United States*, 944 F.2d 855, 858 (Fed. Cir. 1991) (giving *Chevron* deference to Customs regulation concerning statutory exemption from duty); *Generra Sportswear Co. v. United States*, 905 F.2d 377, 379 (Fed. Cir. 1990) (giving *Chevron* deference to Customs' appraisal of quota charges paid by an importer); *Mitsui Foods, Inc. v. United States*, 867 F.2d 1401, 1403 & n.3 (Fed. Cir. 1989) (giving "substantial weight" to Customs interpretation of tariff rate quota provision). Pet. Br. at 21. Had the Government provided any information about the cases it blithely cited, it would be apparent that in none did the Federal Circuit give deference to a *classification* ruling. The cited cases only demonstrate (i) that the Federal Circuit recognizes this Court's directives concerning judicial deference to administrative interpretations, and (ii) that it also understands the fundamental differences distinguishing classification rulings from other types of administrative interpretations in applying a deference analysis.

the dispute was whether permapressing in Mexico constituted an added process in addition to assembly or an "operatio[n] incidental to the assembly process" under subheading 9802.00.80 of the HTSUS, 19 U.S.C. § 1202. The regulation in question, 19 C.F.R. § 10.16(c), expressly provided that permapressing operations were deemed to be an additional operation, thus not incidental to the assembly process. Consistent with the regulation, Customs issued classification ruling HQ 819794 (Oct. 10, 1986), in which it ruled that the Mexican permapressing operations were steps in addition to assembly, thus disqualifying the importer from a duty exemption. The CIT and the Federal Circuit both declined to give controlling weight to the regulation. Neither of those courts, nor this Court, was asked to give deference to the corresponding classification ruling.

On appeal, this Court held that the regulations fit within the "usual rule" that administrative notice-and-comment regulations are within the *Chevron* deferential framework.[29] *Id.* at 390. The Customs classification regulations were to be accorded the force and effect of law, as the Court explained, because of their close resemblance — procedurally and substantively — to legislation. It is precisely the recognition of this delegated lawmaking function that is at the heart of this Court's jurisprudence concerning the scope of *Chevron*. *See, e.g., Martin v. Occupational Safety Health Review Comm'n*, 499 U.S. 144, 157 (1991) (distinguishing less formal legal interpretations entitled to *Skidmore* respect from "norms that derive from the exercise of the Secretary's delegated lawmaking powers"). Indeed, it was the delegation of lawmaking authority exercised in accordance with rigorous procedural

29. This Court ended its inquiry at *Chevron's* first step, determining that the statute was ambiguous; it remanded for a determination on the second *Chevron* step. *Haggar*, 526 U.S. at 395. On remand, the Federal Circuit found the regulation reasonable and entitled to deference. *Haggar Apparel Co. v. United States*, No. 97-1002, 2000 WL 1035747, at *5 (Fed. Cir. July 27, 2000).

safeguards — which is absent from the classification rulings at issue here and the classification ruling that was not before the Court in *Haggar* — that warranted *Chevron* deference for the Customs regulations in *Haggar*.

B. In Contrast to the Notice-And-Comment Regulations In *Haggar*, Customs Classification Rulings Are Not Within The Scope Of *Chevron*.

The Court in *Haggar* noted that the Customs regulation at issue was adopted "upon approval by the Treasury Department, after notice-and-comment rulemaking," 526 U.S. at 386, and concluded that adherence to the *Chevron* framework was warranted "in light of the fact that the agency utilized the notice-and-comment rulemaking process before issuing the regulations." *Id.* at 390; *accord Christensen*, 120 S. Ct. at 1662 (administrative interpretation "not . . . arrived at after, for example, a formal adjudication or notice-and-comment rulemaking" lacked force and effect of law and was not subject to *Chevron* deference); *Reno v. Koray*, 515 U.S. 50, 61 (1995) (noting that internal agency guideline is entitled to less deference than published regulations subject to rigors of APA, including notice-and-comment); *see also Morton*, 415 U.S. at 232 (APA procedures are a prerequisite to deference because "administrative policies affecting individual rights and obligations [should] be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations"). In contrast to the regulations considered in *Haggar*, ordinary Customs classification rulings are not subject to notice-and-comment publication in the Federal Register; nor are they reached through formal adjudication.[30]

30. The procedural system pursuant to which the classification rulings are issued is antithetical to the notion that they should be cloaked with the force and effect of law. Between 10,000 and 15,000 classification rulings are issued each year, potentially from 45 ports of entry. *See supra* at 5. Those rulings are generally — not surprisingly — (Cont'd)

Substantively, the *Haggar* regulation was entitled to *Chevron* deference because it filled the role of a statute, creating a generally applicable, purely legal norm:

> Valid regulations establish legal norms. Courts can give them proper effect even while applying the law to newfound facts, just as any court conducting a trial in the first instance must conform its rulings to controlling statutes, rules, and judicial precedents.

526 U.S. at 391. A Customs classification ruling — unlike a valid regulation — does not create a legal norm. Instead, it "interprets and applies the provisions of the Customs and related laws [*i.e.*, legal norms] to a specific set of facts." 19 C.F.R. § 177.1(d)(1). As noted above, in *Haggar* the Government conspicuously omitted any reference to the ruling that applied the regulation at issue there. *See* Brief for Appellant, *Haggar Apparel Co. v. United States*, 127 F.3d 1460 (Fed. Cir. 1997) (No. 97-1002). This omission — understandable, considering that classification rulings lack all of the qualities that make Customs notice-and-comment regulations fit within the *Chevron* framework — is regrettable, as it deprived the Court there of the opportunity to observe the distinction between the regulation, which created the law, and the ruling, which merely applied it.

In this case, the classification ruling for which the Government seeks deference typifies the application function of a Customs classification ruling. Customs did not consider the meaning of "bound diaries" and "diaries and similar articles" independently to determine a generally applicable norm of law

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quite perfunctory, offering little if any reasoning to explain Customs' classification determination. *See, e.g.*, HQ 953126 (Jan. 11, 1993) (Opp. App. 5a). The protest process is similarly perfunctory, requiring only a limited statement of the importer's position, no opportunity for adversary proceedings, and the possibility that Customs will simply refuse even to grant "further review" when it is requested. *See* 19 C.F.R. §§ 174.12, 174.13, 174.26; *see discussion supra* at 5-7.

before applying that legal interpretation to the Mead day planners. Rather, it used the day planners to find its desired interpretation of the statute. *See generally* HQ 955937 (Oct. 21, 1994) (Pet. App. 28a-47a). Where the statutory term is not ambiguous, *see* discussion *supra* at 16-22, it is impossible to separate the legal issue of the tariff term's meaning from the factual question of whether the imported item is within its scope.[31]

Congress has instructed the CIT to review Customs classification decisions *de novo*, *see* 28 U.S.C. § 2640(a), and the CIT has repeatedly refused to accord controlling-weight deference to classification rulings. *See, e.g., Sulzer Escher Wyss, Inc. v. United States*, 17 Ct. Int'l Trade 609, 612 n.6 (1993) ("Deference to Customs' statutory interpretation in this [tariff classification] context would violate the statutory scheme and decades of practice."). Although Congress has certainly been aware of the CIT decisions, and has had opportunities to alter the statutory *de novo* review, it has never seen fit to do so. *See, e.g.*, Customs Modernization Act of 1993, Pub. L. No. 103-182, 107 Stat. 2057 (adopting substantial changes to customs laws, without altering *de novo* review of classification determinations). This Court acknowledged and expressly preserved that *de novo* review in *Haggar*. 526 U.S. at 391 ("Deference can be given to the regulations without impairing the authority of the court to make factual determinations, *and to apply those determinations to the law, de novo*.") (emphasis

31. The Federal Circuit noted that "the analysis of whether the trial court properly classified the goods *collapses into* a determination of the proper meaning and scope of the HTSUS terms." Pet. App. 4a (emphasis added). The Federal Circuit was correct in observing that the factual and legal aspects of the classification are inseparable, but Mead disagrees with the court's conclusion that the question therefore becomes one exclusively of law. *See Miller v. Fenton*, 474 U.S. 104, 113-14 (1985) (discussing difficulty of labelling issue as question of fact or law where "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case").

added). If controlling weight is given to Customs' *applications of law to fact*, then the importer's statutory right to such broad judicial review becomes illusory. As former Chief Judge Re of the CIT has pointed out, "Congress expressly provided for judicial review," and the Court must settle upon a standard that will "reflect the distinction between meaningful judicial review and the mere appearance, without the reality, of judicial review." Chief Judge Edward D. Re, *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. §§ 1-1550, at LVI (West 1999).[32]

C. The Specific Customs Classification Ruling At Issue Does Not Qualify For *Chevron* Deference.

In *Haggar*, the Court not only determined that the regulation came within Congress's general delegation to "establish and promulgate such rules and regulations not inconsistent with the law . . . as may be necessary to secure a just, impartial and uniform appraisement of imported merchandise and the classification and assessment of duties . . . ," 526 U.S. at 387 (quoting 19 U.S.C. § 1502(a)), but it also looked to the specific statutory gap that the regulation filled. The relevant statute referred to "operations incidental to the assembly process such as cleaning, lubricating and painting," subheading 9802.00.80, HTSUS, 19 U.S.C. § 1202, and the regulation provided a detailed definition of "operations not considered incidental to the assembly process," 19 C.F.R. § 10.16(c) (1998). The Court found that the first step of the *Chevron* analysis was satisfied because the statute, by its own terms, directed Customs to "use its discretion to determine how best to implement the [statute's] policy in those cases not covered by the statute's specific terms." 526 U.S. at 393. *Accord Chevron* at 845 (deference premised

32. Contrary to the self-serving implication of the Government's selective quotation in its argument, Pet. Br. at 21, Judge Re's commentary reflects that classification rulings are properly analyzed under the rubric of *Skidmore* "power to persuade," not the *Chevron* deferential framework. Re at LVI and n. 269.

on theory that administrative interpretation "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute" (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961))); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991) (holding *Chevron* deference applicable "[w]hen Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policy-making authority to an administrative agency"); *Martin*, 499 U.S. at 151 (agency's interpretive lawmaking power derives from "agency's unique expertise and policymaking prerogatives"); Davis, *supra*, § 3.3 at 113 (noting that *Chevron* deference is restricted to "policy disputes within the scope of authority Congress has delegated an agency").

The delegation to Customs with respect to classification rulings, in contrast, lacks the depth and breadth to bestow controlling-weight deference upon its classification rulings. First, the delegating provision cited in *Haggar*, and heavily relied upon here by the Government, does not confer the same authority for the issuance of classification rulings as it does for the promulgation of procedural regulations relating to the issuance of classification rulings. *See* 19 U.S.C. § 1502(a). Section 1502(a) provides that "[t]he Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with the law (*including regulations establishing procedures for the issuance of binding rulings*[33] prior to the entry of the merchandise concerned)" (emphasis added).

33. "Binding rulings" are, according to Customs' own regulations, binding only on Customs itself and the specific importer and merchandise involved in the particular transaction. *See* 19 C.F.R. § 177.9(c). Contrary to the Government's implication, the inclusion of the term "binding ruling" in § 1502(a) does not reflect congressional intent to heighten the power of Customs by endowing classification rulings with the force of law; rather, the intent was to "provide greater certainty to *importers*." H.R. Rep. No. 103-361 (I), 103rd Cong., 1st Sess. 138 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2688 (emphasis added).

The ruling before the Court is not a regulation establishing procedures for classification rulings, but a classification ruling itself, and 19 U.S.C. § 1502(a) does *not* provide the authority that the Government claims.[34]

Second, looking at the statutory scheme under which Customs classifies goods, it is clear that Congress has not delegated any discretionary policymaking authority to Customs.[35] Rather, the provisions of the HTSUS tariff schedules are designed to direct a Customs officer to a single, "correct" classification.[36] The HTSUS General Rules of Interpretation

34. The Government's quotation of the statute in its argument is deceptively elliptical, claiming that "Congress has authorized the agency to adopt such 'binding rulings prior to the entry of the merchandise'." Pet. Br. at 19. Contrary to the Government's disingenuous suggestion, it is the procedural regulations, not the rulings themselves, that bear the imprimatur of Congressional delegation. *See* 19 U.S.C. § 1502(a). The Government's constant references to the delegation of authority to promulgate "rules and regulations" are similarly disingenuous, as the "rules" do not refer to classification *rulings*, but, rather, are used in the APA sense of administrative procedural rulemaking (subject to notice-and-comment) as set forth in 5 U.S.C. § 553.

35. Courts have observed that the tariff schedules — as revenue statutes — "are neither remedial nor in implementation of public policy." *Anhydrides & Chemicals, Inc. v. United States*, 130 F.3d 1481, 1485 (Fed. Cir. 1997), citing *United States v. Wigglesworth*, 38 F. Cas. 595, 596-97 (C.C.D. Mass. 1842) ("Revenue statutes are in no just sense either remedial laws or laws founded upon any permanent public policy, and, therefore, are not to be liberally construed."). Accordingly, this Court has observed that, because of the revenue-generating "policy" of the tariff schedules, any doubt in their construction should be resolved in favor of the importer. *See Hartranft v. Wiegmann*, 121 U.S. 609, 616 (1887) ("But if the question were one of doubt, the doubt would be resolved in favor of the importer, as duties are never imposed on the citizen upon vague or doubtful interpretations." (quotations omitted)).

36. *See Orlando Food*, 140 F.3d at 1440-41 (after concluding that a product is classifiable under a HTSUS heading, the court looks to

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("GRI") set forth a list of instructions — a road map — to be followed in attaining the "correct" classification.[37] *See generally*, GRI 1-6, HTSUS, 19 U.S.C. § 1202. There is no room for discretion or policy judgment under the GRI; instead, Customs is told exactly what to do in the case of any questions or seemingly gray areas.

Third, looking more precisely at HTSUS heading 4820 and its relevant subheadings, there is no ambiguity nor gap to be filled. *See* Argument I, *supra* at 16-22. Customs' efforts to create an ambiguity by probing for alternative dictionary definitions cannot controvert the clarity of the tariff provisions in their statutory context. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("[a]mbiguity is a creature not of definitional possibilities but of statutory context"). In the absence of any statutory "gap" to fill, the classification ruling is not subject to *Chevron* controlling-weight deference. *See Betts*, 492 U.S. at 171 (refusing to accord deference to ADEA interpretive regulation, because "of course, no deference is due to agency interpretations at odds with the plain language of the statute itself"); *Brown*, 513 U.S. at 122 (fact that Department of Veterans Affairs regulation "flies against the plain language of the statutory text exempts courts from any obligation to defer to it."). *Chevron* analysis of the ruling at issue would, therefore, never reach the second step of examining whether the interpretation represented a reasonable construction of the statute. Similarly, the ruling

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subheadings for the "correct" classification); *cf.* 28 U.S.C. § 2643(b) (providing for retrial or rehearing in the event CIT is unable to "determine the correct [classification] decision").

37. For example, GRI 3 provides detailed instructions for "[w]hen . . . for any . . . reason . . . goods are, *prima facie*, classifiable under two or more headings": In such a case, Customs officers are given detailed direction to classify under the more specific heading, or, in the case of composite goods, under the heading covering the component that gives it its essential character, or, as a last resort, under the heading which occurs last in numerical order.

would not survive the second-step reasonableness analysis for the reasons articulated in Argument I, *supra* at 16-22 and Argument III, *infra* at 37-42.

III. THE FEDERAL CIRCUIT'S JUDGMENT IS CORRECT, EVEN IF THIS CUSTOMS RULING WERE SUBJECT TO *SKIDMORE* DEFERENCE.

Declining to give controlling weight to the classification ruling before it, the Federal Circuit held that Customs had erred in classifying Mead's day planners as "bound diaries" under 4820.10.20 because the day planners were neither "bound" nor "diaries." Pet. App. 16a. If the Federal Circuit had been obligated to give any deferential consideration to the ruling, the appropriate deferential analysis would have been *Skidmore*. The Federal Circuit did not expressly examine the ruling's "power to persuade" under *Skidmore*, as the issue was not raised before it or the CIT.[38] However, because "this Court reviews judgments, not opinions," *Chevron*, 467 U.S. at 842, reversal of the Federal Circuit's decision would only be warranted if the application of *Skidmore* analysis would lead to a different result from that reached by the Federal Circuit. Observing the classification ruling under the *Skidmore* lens shows that it has no power to persuade and that the Federal Circuit's decision should be affirmed.

38. The Government never even mentioned *Skidmore* deference until it filed its Petition for Rehearing En Banc, which the Federal Circuit rejected without discussion. There, as here, the Government equivocated and avoided expressly requesting *Skidmore* deference, presumably in fear that it would compromise its already-weak claim to *Chevron* deference. Although the Government had initially claimed *Chevron* deference before the CIT, it expressly waived its deference claim while the parties' cross-motions for summary judgment were pending before the CIT. *See* Opp. Br. at 13-15, Opp. App. 11a-12a. It did not, however, alternatively seek *Skidmore* respect, nor did it raise the possibility of *Skidmore* respect in response to the Federal Circuit's request for supplemental briefing on the impact of *Haggar*. The Federal Circuit cannot, therefore, be faulted for failing expressly to address *Skidmore* deference.

Under *Skidmore*, the degree to which an administrative interpretation has the "power to persuade" depends upon "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." 323 U.S. at 140. Accordingly, the vast majority of Customs classification rulings would be found to lack any "power to persuade," because they are devoid of reasoning. Most classification rulings simply describe the classified item and set forth Customs' tariff determination, without any explanation of how it reached that determination. As one would expect, HQ 953126 (Jan. 11, 1993), by which Customs modified the classification of Mead's imported day planners, provides no reasoned analysis, merely observing that "multi-function looseleaf binders or daily planners are generally used for daily recordkeeping and are classifiable as diaries." (Opp. App. 5a).

The Government, clearly mindful of the deficiencies of the January 1993 ruling, relies instead upon the ruling that addressed Mead's protest and request for further review, HQ 955937 (Oct. 21, 1994) (Pet. App. 28a-47a). That ruling at least purports to engage in some analysis, however flawed it may be. As the Federal Circuit noted,[39] the analysis was faulty because it did not consider the retrospective nature of a diary in contrast to the prospective nature of the day planners,[40] Pet. App. 12a-14a,

39. Although the Federal Circuit expressly reviewed the CIT's reasoning, rather than any underlying Customs ruling, Pet. App. 4a, the CIT's reasoning tracked the reasoning set forth in HQ 955937, *compare* Pet. App. 19a-27a *with id.* at 28a-47a, so that the Federal Circuit did review the same reasoning applied by Customs. The Government's observation that the Federal Circuit did not consider Customs' reasoning, Pet. Br. at 13, is unfair — considering that the Federal Circuit had correctly held that no *Chevron* deference was necessary — and inaccurate, in view of the essential similarities in the reasoning of the CIT and Customs.

40. The Government has the *chutzpah* to accuse the Federal Circuit of failing to give appropriate weight to the common commercial use of (Cont'd)

the limited space provided for notations in the day planners, which make them unsuitable for "diary" functions, *id.* at 13a, and the common meaning of the term "bound" as used in the context of books, *id.* at 14a-15a. In addition, the Federal Circuit correctly noted that Customs had erred in relying upon *Baumgarten v. United States*, 49 Cust. Ct. 275 (1962), *Brooks Bros. v. United States*, 68 Cust. Ct. 91 (1972) and *Charles Scribner's Sons v. United States*, 6 Ct. Int'l Trade 168 (1983). *Id.* at 8a-11a, 36a-43a.[41] All three cases classified goods under earlier tariff schedules, and accordingly, *Baumgarten*, *Brooks Bros.* and *Scribner's* did not address statutory terms with the specificity of the HTSUS subheadings. In particular, the prior tariff classifications under which *Baumgarten*, *Brooks Bros.* and *Scribner's* were decided did not distinguish between diaries and articles similar to diaries, *see* discussion *supra* at 13, and, therefore, none of the cited cases provided guidance on the specific classification issue before the Court. *See* Pet. App. 8a-11a; *accord Mitsubishi Int'l Corp. v. United States*, 182 F.3d 884, 886 (Fed. Cir. 1999) (holding prior classification judgment interpreting provisions of the TSUS inapplicable because of "differing language of the more recently enacted HTSUS"). Although the court of appeals could have reversed on a finding *either* that the day planners were not "diaries" *or* that they were

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the term "diary." Pet. Br. at 13. In fact, the Federal Circuit's decision was supported by the affidavits of *nine* stationery and binding industry experts on the common commercial use of the terms "diary" and "bound." Fed. Cir. JA 98-103, 107-127.

41. The Government's assertion that the Federal Circuit never found the Customs ruling unreasonable, Pet. Br. at 36-37, is incredible, as the court of appeals considered and rejected every major premise of Customs' reasoning. It did not merely "displace[ ] the agency's reasonable interpretation . . . with another, perhaps plausible, interpretation of its own." Pet. Br. at 37. Rather, it expressly recognized the flaws in the foundations of Customs' reasoning, and only then did it topple Customs' specious conclusions and replace them with its own, well-reasoned ones. Pet. App. 8a-16a.

not "bound," the Federal Circuit found Customs' analysis untenable on *both* independent issues, establishing that the ruling was poorly reasoned in its entirety.

Customs' ruling also proves unworthy of respect because it is inconsistent with earlier agency positions,[42] *Skidmore*, 323 U.S. at 140, and particularly with Customs' contemporaneous construction of the applicable HTSUS provisions. *Cf. Zenith*, 437 U.S. at 450 (evaluating respect due to countervailing duty determination based upon consistency with construction adopted contemporaneously with enactment of statute). Here, Customs' modification of its classification of Mead's day planners was a one-hundred-and-eighty-degree reversal from its previous, contemporaneous rulings on the relevant HTSUS subheadings: In the period from 1989 — the effective date of the HTSUS — until approximately 1992, Customs classified Mead and others'

42. The Court has also found inconsistency to be a significant factor when analyzing the reasonableness of an agency interpretation under the *Chevron* framework. *See FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1297, 1300-01 (2000) (denied deference to agency action, influenced by the fact that agency's assertion of regulatory jurisdiction was inconsistent with its prior position); *Nationsbank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 263 (1995) (noting that, under *Chevron* analysis, inconsistency in agency positions reduces deference to be accorded); *Bethenergy Mines*, 501 U.S. at 699 (noting, although agency position was found to be consistent over time, that "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views"); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (noting that if *Chevron* analysis were applied, inconsistency of agency position would eliminate deference to Secretary's position); *Cardoza-Fonseca*, 480 U.S. at 448 n.30 (finding support for decision not to defer in inconsistency of positions BIA had taken over time). While Mead contends that the *Chevron* deferential framework is inappropriate for Customs classification rulings, and that if *Chevron* were applied, the instant ruling would fail at the first step, it should be noted that the ruling would fail on the second *Chevron* step in view of the inconsistency of Customs' historical position on the proper classification of day planners.

day planners as articles similar to diaries, but in 1992 it abruptly changed its position and began to classify the same articles as "bound diaries."[43] *See* NY 864206 (June 19, 1991) (classifying Mead's day planners as "articles similar to diaries" under 4820.10.40) (Opp. App. 1a-3a); *see also* HQ 085086 (Sept. 13, 1989) (Fed. Cir. JA 30-31); HQ 085515 (Dec. 14, 1989) (Fed. Cir. JA 32-34); HQ 950984 (Jan 27, 1992) (Fed. Cir. JA 35-36).[44]

Because of this abrupt reversal, the rulings classifying Mead's day planners under subheading 4820.10.20 are entitled to no weight under a *Skidmore* analysis. In *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257-58 (1991) ("ARAMCO"), the Court applied the *Skidmore* analysis to the EEOC's interpretation of the extraterritorial reach of Title VII. The Court held that the EEOC's interpretation "does not fare well" and

43. The Government attempts to avoid the *Skidmore* inconsistency factor by suggesting that the reversal in its position on the Mead day planners was consistent with rulings HQ 955636 (April 6, 1994) and HQ 955637 (April 6, 1994) — both, like the Mead protest decision, issued in 1994 — classifying day planners under subheading 4820.10.20. Pet. Br. at 8. This suggestion is flatly wrong, as it ignores the earlier 1989-1992 rulings with which all of the subsequent rulings were inconsistent. Further, in HQ 955937 (Oct. 21, 1994), Customs cited a February 10, 1992 ruling in which it had classified another importer's day planners under subheading 4820.10.20 (Opp. App. 5a (citing HQ 089960 (Feb. 10, 1992))). For nearly a year, therefore, from the issuance of the 1992 ruling until the issuance of the January 1993 modification to Mead's classification, Customs simultaneously held two inconsistent positions — classifying Mead's day planners as "other" while classifying another importer's day planners as "bound diaries."

44. Another relevant ruling is HQ 089135 (Jan. 8, 1992), in which Customs found that a children's picture book loosely fastened by stitching and folding was not "bound" because "binding must comprise more than simply fastening together sheets, pages or leaves." Fed. Cir. JA 131. To Mead's knowledge, the ruling remains in effect, and is inconsistent with Customs' interpretation of "bound" in the classification ruling before the Court.

had only limited persuasive value because, besides lacking support in the statute's plain language, the interpretation contradicted the EEOC's earlier interpretations, pronounced closer to the enactment of the statute. *Id.* Like the Customs ruling before the Court, "[t]he EEOC's interpretation of the statute here thus has been neither contemporaneous with its enactment nor consistent since the statute came into law. . . . [I]t also lacks support in the plain language of the statute." *Id.* Customs' position today does not enjoy the special weight afforded to an agency's contemporaneous construction of a statute it is charged to administer. *Cf. Zenith*, 437 U.S. at 450. Indeed, as in *ARAMCO*, the Customs ruling at issue here deserves little, if any, consideration.

CONCLUSION

The Federal Circuit's judgment was correct and should be affirmed.

Respectfully submitted,

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